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Counsel for Plaintiff and the Proposed Class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SHYRIA HENDERSON, on behalf of
herself and all others similarly situated,

**CASE NO. 3:13-cv-1845-L-BLM
CLASS ACTION**

Plaintiff,

VS.

**UNITED STUDENT AID FUNDS, INC.
D/B/A USA FUNDS.**

Defendant.

***EX PARTE APPLICATION TO
EXCUSE NAMED PLAINTIFF'S
APPEARANCE AT THE
MANDATORY SETTLEMENT
CONFERENCE OR, IN THE
ALTERNATIVE, TO CONTINUE THE
MSC***

Hon. Magistrate Barbara Lynn Major
MSC Date: September 10, 2014
Time: 1:30 p.m.

1 Plaintiff Shyriaa Henderson (“Plaintiff”), by and through her counsel of record,
 2 respectfully moves this Court, *ex parte*, for an Order excusing herself from personally
 3 appearing at the Mandatory Settlement Conference (“MSC”) or, in the alternative, to
 4 continue the MSC by thirty (30) days due to a present medical condition of the named
 5 Plaintiff which will make travel extremely burdensome. The MSC is set for September
 6 10, 2014 at 1:30 p.m. in the chambers of the Honorable Barbara Lynn Major, United
 7 States Magistrate Judge, United States Courthouse, 333 West Broadway, Suite 1110,
 8 San Diego, California 92101.

9 Plaintiff respectfully requests that the Court grant Plaintiff’s *ex parte* application.
 10 On August 21, 2014, Plaintiff filed an *ex parte* application for modification of the
 11 scheduling order [Dkt. No. 22]. Dkt. No. 30. Plaintiff’s *ex parte* application advised
 12 the Court that Plaintiff seeks modification of the scheduling order so that, after receipt
 13 of certain discovery regarding non-party collection agencies who collected on
 14 Plaintiff’s account, Plaintiff may file a First Amended Complaint. *Id.* Due to
 15 Plaintiff’s intention to file a First Amended Complaint, Plaintiff seeks to amend all
 16 deadlines in the current scheduling order by ninety (90) days. *Id.* Defendant filed an
 17 opposition to Plaintiff’s *ex parte* application to modify the scheduling order on August
 18 25, 2014 (Dkt. No. 36) and Plaintiff filed a reply on August 29, 2014 (Dkt. No. 38).

19 The parties have met and conferred regarding Plaintiff’s *ex parte* application and
 20 Defense counsel for Defendant has advised that it opposes Plaintiff’s request to excuse
 21 the named Plaintiff from the MSC. Although Plaintiff’s counsel has advised Defense
 22 counsel of Plaintiff’s recent medical situation affecting her ability to attend the
 23 presently scheduled MSC, Defense counsel has not advised if Defendant will oppose
 24 Plaintiff’s request to continue the date of the MSC. See Declaration of Alexis M.
 25 Wood, filed herewith (“Wood Decl.”), ¶¶ 2, 4.

26 **I. Good Cause Exists to Excuse the Named Plaintiff’s Appearance at the MSC**

27 Good cause exists for this request. Plaintiff, individually and on behalf of others,

1 allege Defendant United States Aid Funds, Inc. d/b/a USA Funds (“Defendant” or
 2 “USA Funds”), a “guaranty agency” of federal student loans engaged the services of
 3 Sallie Mae, Inc., now known as Navient Solutions, Inc. (“Navient”), to service and
 4 collect defaulted student loans. On behalf of USA Funds, either Navient itself or other
 5 third-party collection agencies (USA Funds’ agents), obtained the telephone numbers
 6 of potentially thousands of individuals nationwide, without authorization, and thereafter
 7 used an automatic telephone dialing system and/or prerecorded voice message to
 8 repeatedly call each of those individuals on their cellular phones. Through that
 9 conduct, Defendant not only harassed each member of the putative class, but repeatedly
 10 violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”),
 11 thereby entitling those individuals to an identical calculation of statutory damages and
 12 uniform injunctive relief. *See generally* Complaint, (Dkt. No. 1)

13 Currently, Plaintiff is in the mist of conducting discovery in order to determine
 14 which third-party vendors Navient used to place the phone calls on its behalf. Wood
 15 Decl., ¶ 5; *see generally* Plaintiff’s pleadings regarding an extension to the scheduling
 16 order, Dkt. Nos. 30 & 38. At this time, Plaintiff is still unaware what third-parties
 17 collected on Plaintiff’s account and if Navient itself – or even USA Funds – made
 18 collection calls themselves. Wood Decl., ¶ 6. Thus, a Rule 30(b)(6) deposition of
 19 Navient is scheduled for September 16, 2014, in order understand the records produced
 20 by Navient and determine the entities making the calls. *Id.*

21 Once those third-parties are confirmed, after Navient’s 30(b)(6) deposition on
 22 September 16, 2014, Plaintiff will seek to amend her complaint to add those parties and
 23 thereafter serve requests, including but not limited to, requests for an outbound dial list,
 24 requests for prior express consent documents, and requests regarding the entities
 25 telephone dialing equipment. Through this course, Plaintiff believes that she can
 26 demonstrate that the student loan servicer for all of the putative class members is Navient,
 27 and that Navient hired the same third-party debt collectors to place phone calls on behalf
 28

of USA Funds. Furthermore, Plaintiff intends to show that the third-party debt collection agencies working on behalf of Defendant and Navient called the putative class members' cell phones with an autodialer or prerecorded voice and without prior express consent. Wood Decl., ¶ 7.

Outbound dial lists of the third-party collection agencies are required to determine the size of the class, the number of calls to cellular telephone, as well as the total potential liability. Plaintiff and Plaintiff's counsel contend that they owe a fiduciary duty to the putative class and cannot make a settlement demand for any amount without, at a minimum, basic discovery as to the parameters of the prospective class. Thus, class-wide settlement is unlikely at this state of the litigation. Frequently the Courts recognize this dilemma in the class action context and excuse the named Plaintiff personal appearance from settlement conferences.

Considering the nature of this class pled case, the position of the respective parties in regard to discovery, and the burden associated with ordering the named Plaintiff to travel cross-country for the MSC, Plaintiff respectfully requests that the Court grant her *ex parte* application to excuse Plaintiff's personal appearance from the MSC.

II. Plaintiff Alternatively Requests to Continue the MSC Due to Plaintiff's Present Medical Condition

Should the Court be inclined to deny Plaintiff's request to excuse her personal appearance from the MSC, Plaintiff requests that the date of the MSC be continued by thirty (30) days due to her present medical condition. Counsel for Plaintiff today learned that Ms. Henderson has been hospitalized for the past two (2) weeks due to high enzymes levels in her pancreas. Wood Decl., ¶ 3. Due to this situation, travel at this time will be extremely burdensome. *Id.*

Respectfully submitted,

Dated: September 5, 2014

By: /s/ Alexis M. Wood

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